IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 414

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

ST. LOUIS GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

PAUL E. DIXON,
722 Chestnut Street,
St. Louis 1, Missouri,
JEROME J. DUFF,
818 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
How Federal Question Is Presented	4
Reasons for Granting the Writ	5
Conclusion	8
Appendix A—Opinion Below	9
Appendix B—Petitioners' Motion for Rehearing in Missouri Supreme Court	24
Appendix C—Per Curiam Opinions of Missouri Supreme Court on the Motions for Rehearing in the Similar Cases Arising Out of the Same Occurrence and Referred to in Petitioners' Per Curiam Opinion in Missouri Supreme Court on Petitioners' Motion for Rehearing	32

AUTHORITIES.

Cases.

Charles Dowd Box Co. v. Courtney, 82 S. Ct. 519	4
Chater v. Carter, 35 S. Ct. 859	6
Radio Station WOW v. Johnson, 65 S. Ct. 1475	5
Smith v. Evening News Association, 83 S. Ct. 267	4, 5, 7

Teamsters Local 714 v. Lucas Flour, 82 S. Ct. 571 ... 4
Textile Workers Union v. Lincoln Mills, 77 S. Ct. 912, 4
United Steelworkers v. American Mfg. Co., 80 S. Ct. 1343 ... 4
United Steelworkers v. Warrior & Gulf Co., 80 S. Ct. 1347 ... 4
Williams v. State of Georgia, 75 S. Ct. 814 ... 5

Statutes.

Labor Management Relations Act, Section 301 (a), U. S. C. ... 2, 4
Section 185 (a); 29 U. S. C. A., Section 185 (a) ... 2
28 U. S. C., Section 1257 (3) ... 2

Certified Exhibits in Exhibit Folder.

Exhibit A—Labor-Management Contract of Parties.

Exhibit E—Globe-Democrat Publishers Statement of termination of employees and announcement of sale.

Exhibits F, G, H, and I—Correspondence between parties regarding continuance of insurance benefits, March 17, 1959, to June, 1959.

Exhibit J—Excerpt of Testimony of G. D. Bauman, Business Manager of Globe-Democrat.

Exhibit K—Pulitzer Publishing Co. (Post-Dispatch) statement of policy relating to former Globe-Democrat employees.

Certified Copies of Per Curiam Opinions of Missouri Supreme Court Denying Motions for Rehearing or Transfer to Court En Banc in three similar, related cases.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. .....

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

ST. LOUIS GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

The petitioners, Joseph P. Monterosso et al., pray that a writ of certiorari issue to review the opinion of the Supreme Court of Missouri entered in this cause on April 8th, 1963, and supplemented by the opinion and final judgment denying a motion for rehearing or to transfer to the Missouri Supreme Court en banc entered June 4, 1963.

OPINIONS BELOW.

The opinion of the trial court (Circuit Court, City of St. Louis) (T. 20) is unreported. The opinion of the Supreme Court of Missouri (T. 119, Appendix A, p. 9) is officially reported, 368 S. W. 2d 481. The instant case is one of four similar cases arising out of the same occurrence. The opinions of the Supreme Court of Missouri deciding the other three cases are styled and reported, Irwin et al. v. St. Louis Globe-Democrat Publishing Company, 368 S. W. 2d 452; Allen et al. v. St. Louis Globe-

Democrat Publishing Company, 368 S. W. 2d 460 and Ackerman et al. v. St. Louis Globe-Democrat Publishing Company, 368 S. W. 2d 469. The opinions of the Missouri Supreme Court in the instant case and the per curiam opinions of related cases are printed in Appendix A, p. 9; and Appendix C, p. 32.

JURISDICTION.

The final judgment of Division Number One of the Missouri Supreme Court denying rehearing or transfer to the court en banc was entered on June 4, 1963 (T. 153). The jurisdiction of this Court to issue its Writ is invoked under authority of 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED.

Whether a state supreme court may interpret a collective bargaining agreement, in a suit by individual employees against the employer, by rejecting from consideration the intention of the parties, the context in which the agreement was negotiated and the purpose which the collective bargaining agreement is intended to serve.

STATUTE INVOLVED.

The statutory provision involved is the Labor Management Relations Act, Section 301 (a), 29 U. S. C., Section 185 (a); 29 U. S. C. A., Section 185 (a).

The pertinent portion is:

> "(a) Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT.

The submission of this case in the trial court was on an agreed statement of facts (T. 14). Briefly, these facts establish that the respondent-employer-newspaper (hereinafter referred to as "Globe"), sold its building and printing plant to another newspaper (hereinafter referred to as "Post"). The Globe then entered into a contract with the Post whereby the Post printed the Globe. The Globe then terminated all of its mechanical department employees. These petitioners (hereinafter referred to as "Mailers") were the exclusive labor force for the Globe in its mail room operations.

The Mailers claimed severance pay and vacation pay from the Globe on the basis of their collective bargaining agreement (Exhibits Folder, Exhibit A). The Globe refused to pay. Litigation below resulted in judgment for vacation benefits and a refusal to award severance pay. The controversy revolves around the method of interpretation of the severance pay section of the contract. The pertinent clause is as follows (Exhibits Folder, Exhibit A, p. 18, Article XI, Dismissal Pay, p. 18, paragraph No. 2):

> "2. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this contract, all employees who lose employment thereby shall receive severance pay as follows:
>
> (a) Employes having six months priority standing, six (6) weeks pay.
>
> (b) Employees having one year or more priority standing, twelve (12) weeks pay.
>
> 3. Such dismissal pay or severance pay shall be at the employe's regular straight time rate of pay. Priority standing shall be as recorded on the books of chapel officers and the books of the Publishers at the

time of such lay off, suspension, merger or consolidation."

The Missouri Supreme Court opinion held "the language of paragraph 2, relating to 'consolidation' is clear and unambiguous and capable of being enforced and given effect without resort to judicial construction to determine the intention of the parties;"

HOW FEDERAL QUESTION IS PRESENTED.

The submission of this case on the agreed statement of facts in the trial court and the appeal of the trial court judgment on a de novo submission to the Missouri Supreme Court did not raise the federal question which is relied upon in this application. Following the issuance of the original Missouri Supreme Court opinion on April 8, 1963, the petitioners filed a timely motion for rehearing in the Missouri Supreme Court (Appendix B, page 24). This motion clearly and unequivocably raised the federal question by pointed reference to the requirements of Section 301 (a), 29 U. S. C. as interpreted by the case of Smith v. Evening News Association, 83 S. Ct. 267, decided December 10th, 1962. The motion for rehearing also relied upon and urged consideration of the following additional authority:

1. Textile Workers Union v. Lincoln Mills, 77 S. Ct. 912.
2. Charles Dowd Box Co. v. Courtney, 82 S. Ct. 519;
3. Teamsters Local 714 v. Lucas Flour, 82 S. Ct. 571;
4. United Steelworkers v. American Mfg. Co., 80 S. Ct. 1343;
5. United Steelworkers v. Warrior & Gulf Co., 80 S. Ct. 1347.

The Missouri Supreme Court denied the motion for rehearing in a separate opinion on June 4, 1963 (T. 153). A

series of related opinions denying the motions in the four similar and related cases pending against the Globe which arose out of the sale to the Post clearly considered the entire federal question raised in the motion (Appendix C, p. 32). The Missouri Supreme Court thus clearly considered and ruled upon the merits of these causes on the basis of the federal question.

"This Court has considered the federal question timely raised in a state supreme court on a motion for rehearing when the state court actually exerts "its jurisdiction in such a way that the case could have been brought here (United States Supreme Court) had the questions been raised prior to the original disposition." (Radio Station WOW v. Johnson, 326 U. S. 120, l. c. 128, 65 S. Ct. 1475, l. c. 1480).

This Court ruled in the case of Williams v. State of Georgia, 349 U. S. 375, l. c. 383, 75 S. Ct. 814, l. c. 819 that "where a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right".

REASONS FOR GRANTING THE WRIT.

1. This case was fully briefed and was orally argued in the Missouri Supreme Court by January 24, 1963. The decision of Smith v. Evening News Association, 83 S. Ct. 267, had been published only three weeks before. Neither counsel nor the Missouri Supreme Court were made aware of the Smith v. Evening News opinion until after these cases had been finally briefed, argued and submitted. The initial decisions of the Missouri Supreme Court were all handed down on April 8th, 1963. The employees' motions for rehearing or transfer to the court

en banc in the four pending cases all simultaneously raised the rule of Smith v. Evening News and the related federal cases cited in Smith v. Evening News regarding the Congressional mandate for the courts to formulate and apply federal law in these suits brought by individual employees involving individual claims. The Writ should issue in order to allow these individual petitioners the opportunity to properly present their claims in the flood light of federal law. Rule 19, Paragraph 1 (a) of this Court best describes the situation.

2. The Missouri Supreme Court remained totally preoccupied with ordinary contract law throughout the opinion in this case. The only reference made to federal law in the original decision was the citation of the forty-eight year old United States Supreme Court opinion in the case of Chater v. Carter, 238 U. S. 572, 584, 35 S. Ct. 859, 863 (Appendix A, p. 9). This authority, involving the interpretation of a trust agreement, was relied upon for this type of narrow legal reasoning in interpreting a collective bargaining agreement: "Our function is to determine what the parties intended by what they said, and we cannot be concerned by what they may have intended to say." Petitioners pray the Writ to issue in order for this Court to enlighten the Courts of Missouri that the proper legal reasoning in interpreting a collective bargaining agreement today requires:

(a) Special heed to be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve,

(b) A collective bargaining agreement states the rights and duties of the parties. It is more than a contract, it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.

(c) The collective bargaining agreement calls into being a new common law—the common law of a particular industry or plant.

(d) A collective bargaining agreement is an effort to erect a system of industrial self-government.

(e) The words of a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of self government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion.

The above criteria are all found in the opinions of this Court as cited authority in Smith v. Evening News. A comparison of any or all of these criteria with the opinion and authorities relied upon by the Missouri Supreme Court in its decision in the instant case leaves no doubt that this Court must move Missouri over into the column headed "states having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law".

3. The reported opinion of the Missouri Supreme Court is the best evidence of the compelling reason why this Writ should be granted. The consistent contentions of these petitioners as to how the Court below should interpret the collective bargaining contract are fairly and concisely set out in the reported opinion. The rejection by the Missouri Supreme Court, of the petitioners' contentions and the application of principles totally foreign and repugnant to the criteria for interpretation now required by this Court is also clearly set out in the reported opinion. To allow this opinion to stand as the law binding employees and employers in Missouri to this type of legal reasoning in the interpretation of the provisions of their collective bargaining agreements would isolate Missouri like a leper colony from the hoped for uniform body of federal substantive labor law.

CONCLUSION.

For the suggested reasons petitioners again pray that Petition for a Writ of Certiorari should be granted.

.....

PAUL E. DIXON,

.....

JEROME J. DUFF,

Counsel for Petitioners.

Affidavit of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioners herein, and an attorney of record for the Petitioners in the Courts below, depose that on the ..... day of August, 1963, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Lon O. Hocker, Jr., Attorney of Record for the Respondent in care of the law offices of Hocker, Goodwin and MacGreevy, Ambassador Building, 411 North Seventh Street, St. Louis 1, Missouri.

.....

Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this ..... day of August, 1963.

.....

Notary Public.

My Commission Expires: .....

APPENDIX A.

Joseph P. Monterosso et al., Appellants,

v.

St. Louis Globe-Democrat Publishing Company, Respondent.

No. 49,603.

Supreme Court of Missouri, Division No. 1.

April 8, 1963.

Houser, Commissioner.

This is an action by sixty-four members of St. Louis Majlers' Union, Local No. 3 of the International Typographical Union, against the corporate publisher of St. Louis Globe-Democrat for vacation pay, severance pay, and penalties under § 290.090, V. A. M. S., under a collective bargaining agreement. Tried to the court without a jury on an agreed statement of facts, the court rendered judgment for plaintiffs for $17,462.90 plus interest for vacation pay, but denied plaintiffs' other claims. Globe-Democrat did not appeal. Plaintiffs appeal from the order and judgment overruling their after-trial motions, now contending that in denying their claims for severance pay and penalties and interest (totaling more than $140,000) the court misconstrued the contract. We have jurisdiction because the amount in controversy exceeds $15,000, and we consider the appeal on its merits notwithstanding plaintiffs did not appeal from the judgment on the merits, because that was the evident intention of plaintiffs.

Plaintiffs were employees of and "regular situation holders" with the Globe-Democrat. The terms of their employment were governed by a collective bargaining con-

tract between Mailers' Union and St. Louis Newspaper Publishers' Association. The association consists of the two corporations which publish the St. Louis Post-Dispatch and the St. Louis Globe-Democrat. The contract consisted of a preamble and sixteen articles relating to Jurisdiction, Hiring, Disputes and Discharges, Wages and Hours, Foremen, Priority, Military Service, Apprentices, Holidays, Vacations, Dismissal Pay, Jury Service-Voting Time—Funeral Pay, Sickness and Disability Benefits, and other miscellaneous matters.

We are particularly concerned with Article XI, Dismissal Pay:

"1. Any employe who has had a regular situation for more than one year who is laid off to reduce the force shall receive dismissal pay on the basis of one week's pay for each year of continuous priority.

"2. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this contract, all employes who lose employment thereby shall receive severance pay as follows:

"(a) Employes having six months priority standing, six (6) weeks' pay.

"(b) Employes having one year or more priority standing, twelve (12) weeks' pay.

"3. Such dismissal pay or severance pay shall be at the employe's regular straight time rate of pay. Priority standing shall be as recorded on the books of chapel officers and the books of the Publishers at the time of such lay off, suspension, merger or consolidation."

Other provisions should be particularly noted.

Paragraph 6 of the Preamble provides that the refusal of employes to cross a picket line where a strike sanction

has been issued by International Typographical Union does not constitute breach of contract, and shall not affect employes' accrued benefits and rights (except the employe would not be paid for time lost as a result of his refusal to cross a picket line).

Paragraph 8 of the Preamble provides: "All wages, vacation credits and severance pay credits shall be considered as an earned equity and shall have prior claim in the event of merger, permanent suspension or liquidation. The cash equivalent of any such earned equity shall be paid immediately upon any employe's severance of employment as a result of such merger, permanent suspension or liquidation."

Paragraph 7, Article IV states in dollars and cents what the "wages of all journeymen" shall be, on an hourly, daily and weekly basis.

On February 21, 1959, at about 2:30 a. m., a strike was begun by St. Louis Newspaper Guild, which was the bargaining representative of Globe-Democrat employees in editorial, business and maintenance classifications (not the bargaining representative of plaintiffs). A picket line was erected around the premises of Globe-Democrat from that time to the date of the settlement of the strike, May 27, 1959.

Plaintiffs refused to cross the picket line of the Guild, and none of the plaintiffs reported to Globe-Democrat for work from the time the picket line was put up.

All of the plaintiffs took employment elsewhere during the period between February 21 and June 1, 1959, when publication of Globe-Democrat was resumed following settlement of the Guild strike.

After February 27, 1959 the Mailers' Union "froze" the "priority board" at Post-Dispatch and members of the

Mailers' Union taking employment at Post-Dispatch remained in the capacity of "extras" (not regular situation holders) and acquired no priority standing until some time after June 1, 1959. Their wage rates and conditions of employment at Post-Dispatch continued as set forth in the collective bargaining contract described above.

On February 27, 1959, the corporations which publish Globe-Democrat and Post-Dispatch entered into a contract by which Globe-Democrat sold its principal physical properties, subject to a temporary lease-back of business and editorial quarters, to Pulitzer Publishing Company, publisher of St. Louis Post-Dispatch, and by which Globe-Democrat was to be printed for this defendant by Pulitzer following the settlement of the strike. Pursuant to the contract Globe-Democrat executed a deed conveying to Pulitzer the building in which it had conducted its business and accounting offices, and a bill of sale to the bulk of its mechanical equipment, presses and machinery, including all of the equipment used by plaintiffs in the normal employment with Globe-Democrat. On February 27, 1959 the president and publisher of Globe-Democrat notified the representatives of all of the mechanical crafts, including plaintiffs' representatives, and mailed a letter to all employees, in part as follows:

"To effect greater economy and efficiency in mechanical operation, The Globe-Democrat today entered into an agreement with the St. Louis Post-Dispatch under which The Globe-Democrat will be printed by the Post-Dispatch, when and if the Guild strike is settled.

"The sale is of the physical property only. The editorial, advertising, circulation and business departments of the two newspapers will be entirely separate. The Globe-Democrat will continue as a completely independent newspaper in every sense of the word.

"The consolidation of mechanical operations between competing newspapers finds great precedent in many cities throughout America, * * * as the mechanical costs of publishing a daily newspaper continue to rise. * * *

"This move is made necessary because of the demands of the St. Louis Newspaper Guild. * * *.

"Members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, the dismissal provisions of the current mechanical contracts will apply. * * *"

Throughout the period of the strike Globe-Democrat maintained the status of plaintiffs under the Blue Cross-Blue Shield program and group life insurance program.

In the opinion of the business manager and publisher of Globe-Democrat it would have been possible, notwithstanding the strike, to have prepared for printing and to have published Globe-Democrat during the period February 21-27, 1959, using supervisory personnel not on strike for the production of news content and advertising copy, if enough of the employees, members of the mechanical crafts, had been willing to cross the picket line to do the necessary mechanical work, and after February 27, 1959 it would have been possible to have rented mechanical equipment at some other print shop in the St. Louis area and to have printed a much curtailed and limited edition of the paper, had enough members of the mechanical craft employees of Globe-Democrat been willing to do the mechanical work under such circumstances. Globe-Democrat would have published such a newspaper during the strike if it had been reasonably possible to do so. Efforts were made by the business manager of the newspaper to persuade certain of the unions to return their members to work during this period and as late as May, 1959, but since

none of the employees would return to work, no concerted effort was made to rent such equipment, and none was rented.

At a hearing before the Unemployment Compensation Commission on May 18, 1959 the business manager of Globe-Democrat testified that the employer-employee relationship of the Mailers' Union members and Globe-Democrat in effect before February 21, 1959 had continued, without change, and that none of the employees had been suspended, laid off, or terminated since that date; that their job status and work rights had not been prejudiced; that there had been no violence or unlawful conduct, or any other basis for discharge; that none of them or their union representatives had notified Globe-Democrat that they had taken any steps to terminate the employer-employee relationship that existed prior to February 21, 1959.

On June 2[illegible] 1959 (following a hiatus of fourteen days caused by a strike of members of the Stereotypers' Union against Post-Dispatch) most of the plaintiffs became "situation-holders" at Post-Dispatch under the same contract under which they had previously worked for Globe-Democrat. Those who did not obtain such positions could have done so if they had so wished.

At various dates between May 29 and August 29, 1959 Globe-Democrat received letters from counsel for each of plaintiffs making demand for payment of wages as provided by § 290.110, and letter of dismissal as provided by § 290.140, V. A. M. S. Each such letter was answered by letter from Globe-Democrat stating that the addressee was employed as a mailer from the date he entered the employ until February 21, 1959 "when you failed to report to work. You have not reported for work since, and we understand you have taken employment at the Post-Dispatch. The right to benefits of severance pay and vacation pay, which you assert, are the subject of a pending

arbitration with your union under Article III of the last current contract.".

The data on each employee showing the amounts of the severance pay, vacation pay and penalty (60 days wages) due, if entitled to recover such items, was agreed upon.

On this appeal plaintiffs make three points.

[1] Plaintiff's first point raises the question whether **"the consolidation of Respondent's mechanical operations"** comes within the meaning of paragraph 2, Article XI, supra.

The trial court ruled that the language of paragraph 2 was unambiguous, clear and concise; that the proof showed no consolidation, i. e., no new corporation springing into existence to assume the liabilities of former corporations dissolved and ceasing to exist; that what happened was a "reduction of force by contracting out the mechanical end of the business," and that these facts were not subject to the strained construction that they constituted a "consolidation."

We restate the pertinent portion of paragraph 2: "In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this contract, all employees who lose employment thereby shall receive severance pay as follows: * * *."

The word "newspaper" obviously refers to the publishing company, and not to the publication. Plaintiffs seem to concede this by the use of the phraseology "consolidated with another publishing company" in paragraph 4 of their petition.

We are here concerned only with the word "consolidation" as used in paragraph 2, supra, for in the lower court plaintiffs frankly admitted that there had been no merger or permanent suspension of publication.

Plaintiffs contend that the consolidation of the mechanical operations of Globe-Democrat with those of Pulitzer Publishing Company, publisher of the Post-Dispatch, was such a "consolidation" and otherwise came within the coverage of the entire provision, when the contract as a whole is properly construed; that the words are not clear and unambiguous, as the trial court decided, but require construction. They say the court improperly relied upon abstract definitions to reach its result and failed to consider and apply the following rules: that the whole subject matter must be considered from end to end and from corner to corner as well as all terms of the contract, for one clause may modify, limit or illuminate the other; that the intention of the parties must be gathered from a consideration of all of the provisions; that greater regard is to be had to the clear intention of the parties than to any particular words they may have used in attempting to express that intent; that in ascertaining that intent the court should consider the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and the apparent purpose which the parties were undertaking to accomplish. Applying these principles for which plaintiffs cite numerous Missouri cases, plaintiffs contend this is not a contract between corporations with corporate ownership and control as its subject matter, but a collective bargaining agreement with an unincorporated association of employees the obvious purpose of which is to protect the employee against sudden loss of employment brought about by any business manœuver or manipulations it might undertake during the term of the agreement; that the obvious intention was to provide severance pay under **any** circumstances which might cause severance of the employer-employee relation by impact of forces beyond his control. Plaintiffs say "It is patently impossible to anticipate and provide for, much less classify

and describe, every situation that can arise in industrial management of a large corporation * * *. It is obvious from the language used both in the subject provision and in the related provision found in Paragraph (8), page 3, of the Preamble, that the parties were here attempting to cover every situation which might arise. The failure in an attempt to accomplish that which is virtually impossible does not alter the fact of the existence of an obvious intention to do so. * * * [H]ad the parties contemplated such a maneuver at the time the contract was executed, it would have been expressly provided for in the appropriate clause. * * * Such an obvious omission, [to provide for a situation wherein all the jobs of a department are lost due to consolidation of that department with the like department of another corporation] in a contract may be supplied by implication. * * * [T]he parties intended to be controlled by the thought expressed rather than by the words employed to express it." Plaintiffs say that a consideration of Preamble, Paragraph 8, and of Paragraph (1) of Article XI, assists in the interpretation of Article XI, paragraph 2.

We are of the opinion that the language of paragraph 2 relating to "consolidation" is clear and unambiguous and capable of being enforced and given effect without resort to judicial construction to determine the intention of the parties; that paragraph 2 contemplates three possible, specifically defined and delimited situations in which Globe-Democrat Publishing Company, a corporation, might go out of business as the publisher of a newspaper; that the word "consolidation" refers to consolidation of corporations, not to consolidation of the mechanical operations or of any department or partial function of Globe-Democrat; that no consolidation within the plain meaning of paragraph 2 was shown by the evidence to have occurred; that the facts do not fit any of the three situations contemplated, and therefore plaintiffs' rights to severance

pay under the contract have not been established. Where the issue has been so raised as to call for judicial construction of the language of paragraph 2 the same result is reached. Ackerman v. Globe-Democrat Publishing Co. (St. Louis), Mo., 368 S. W. 2d 469; Allen v. Globe-Democrat Publishing Co. (St. Louis), Mo., 368 S. W. 2d 460. No considerations advanced here invalidate the conclusions reached in those cases.

[2-5] The sum and substance of plaintiff's argument is that although the drafters of the contract failed to provide for the contingency that actually happened, the omission was obvious, and this Court should add a new provision, by implication, providing for severance pay upon loss of employment **under any circumstances which cause the severance of the employer-employee relation, as a result of forces beyond the employee's control.** This Court has no such power in this action. The courts cannot make contracts for litigants, Meyer v. Christopher, 176 Mo. 580, 594, 75 S. W. 750, 754, or rewrite contracts by judicial interpretation. Globe-Democrat Publishing Co. v. Industrial Commission, Mo. App., 301 S. W. 2d 846, 851 (2). This is not a suit to reform a contract, but an action to recover under the terms of a contract. Plaintiffs must prevail, if at all, upon the basis of the contractual provisions written into the contract. Our function is to determine what the parties intended by what they said, and we cannot be concerned with what they may have intended to say. Chater v. Carter, 238 U. S. 572, 584, 35 S. Ct. 859, 863, 59 L. Ed. 1462. Their intention must be gathered **from the language used in the contract.** Strauss v. J. C. Nichols Land Co., 327 Mo. 205, 211, 212, 37 S. W. 2d 505, 508 (2). That language fails to make provision for severance pay under the stipulated facts.

[6] Plaintiffs' second point—"[t]he Employees 'Lost Employment' as a result of the consolidation of the me-

chanical operations of Respondent"—is not sufficient to raise any question for appellate review because it fails to state what actions or ruling of the court are claimed to be erroneous and why it is contended the court was wrong in any action or ruling. It is an abstract statement not shown to be related to any action or ruling of the court. It violates Supreme Court Rule 83.05 (e).

[7] Nevertheless we point out that even though plaintiffs lost employment as a result of the sale of the physical plant and printing equipment of Globe-Democrat and the execution of the printing contract with Post-Dispatch, proof of these facts would not entitle plaintiffs to severance pay, since such loss of employment was not included in any of the contingencies provided for in the contract: merger, consolidation or permanent suspension of publication. Only loss of employment "thereby" would have entitled plaintiffs to severance pay. Plaintiffs having admitted there was no merger or permanent suspension of publication, and this Court having found there was no consolidation, there was no contractual liability for severance pay on the basis of loss of employment from any **other** cause.

Plaintiffs' third point is that the trial court erred in its refusal to award appellants the penalty payments provided by § 290.110, V. A. M. S., for unlawful withholding of wages in violation of the statute, because vacation and severance pay are wages in fact and in law, under the contract, and under the statute.

Section 290.110 provides: "Whenever any corporation doing business in this state shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of any such servant or employee then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ;

and such servant or employee may request in writing of his foreman or the keeper of his time, to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money aforesaid, or a valid check therefor, does not reach such station or office within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

[8] Since no severance pay was due, we confine ourselves to the question whether vacation pay was unlawfully withheld in violation of § 290.110. This section is penal in character, Durant v. Industrial Products Mfg. Co., 241 Mo. App. 266, 235 S. W. 2d 574; Quinn v. T. M. Sayman Products Co., Mo. App., 296 S. W. 198, and is to be strictly construed.

[9, 10] Unpaid vacation pay under the collective bargaining contract did not constitute "unpaid wages * * * then earned at the contract rate," within the meaning of § 290.110. Neither Article X, Vacations, nor any other provision of the contract, classifies pay for vacations as wages, expressly or by implication. On the contrary, other provisions clearly indicate that it was not within the contemplation of the parties that vacation pay be regarded as the equivalent of or included as a part of an employee's wages. Wages and vacation credits are treated as separate and distinct in Paragraph 8 of the Preamble, wherein "All wages, vacation credits and severance pay" are referred to as an earned equity. In the separate Article IV, dealing specifically with the subject Wages and Hours, no reference is made to vacation pay but there is a definite provision that "the wages of all journeymen * * *

shall be" a specified, certain number of dollars and cents, listed at day and night rates by the hour and at certain amounts in dollars and cents per day and per week. Overtime rates are prescribed at price and one half of the "regular hourly rate." "All wages" are agreed to be paid weekly in cash or current funds. "The wage rates" contained in that article are agreed to be minimum rates, and provision is made that "compensation shall be on a time basis." We conclude from a reading of the entire contract that the parties differentiated between vacation pay and wage pay; that by agreement of the parties they are not one and the same; that the statutory words "unpaid wages * * * then earned at the contract rate" under this contract apply only to the wage rates prescribed in Article IV and have no application to vacation pay credits reserved therein; that "wages * * * earned at the contract rate" under § 290.110 refer to the basic rate of pay, People v. Vetri, 309 N. Y. 401, 131 N. E. 2d 568, 571, i. e., wage payments due and payable at regular intervals, Cotton-Moore Corporation v. Johnston, 23 Ill. 2d 341, 178 N. E. 2d 336, and have no reference to vacation credits calculated on the basis of priority, number of days worked during the preceding calendar year, and payable only once and in one sum.

Although for the purpose of giving priority to wage earners over other creditors under the Bankruptcy Act, § 64, sub. a, par. (2), 11 U. S. C. A., § 104, sub. a, par. (2), it has been held that vacation pay constitutes "wages" as that term is used in that Act, In re Public Ledger, Inc., 3 Cir., 161 F. 2d 762; In re Wil-Low Cafeterias, Inc., 2 Cir., 111 F. 2d 429, these are cases in which no penalty is involved, and their holdings may not be extended to cases involving a penal provision such as § 290.110. Furthermore, in the Public Ledger and Wil-Low Cafeterias cases it does not appear that the contract defined wages

in the limited way "wages" are defined in the instant contract, or by implication excluded vacation pay from the definition of wages.

[11-13] Finally, plaintiffs' requests for payment under § 200.110 were not timely. While the time within which request for unpaid wages shall be made is not stated it is clear by necessary implication that the request must be made within a short time after discharge. One of the objects of the statute is to effect a quick payment to the wage earner of wages due and unpaid at time of discharge. By the proviso it is contemplated that unless actions for the prescribed penalty be commenced within sixty days from date of discharge or refusal to further employ, the penalty of continuing wages will not continue more than sixty days. While request for unpaid wages need not be made immediately after discharge, it must be made within a reasonable time. Every request in the instant case was made at least ninety days after date of discharge, and in some cases as much as one hundred eighty days thereafter. Having in mind the objects and purposes of the statute, and the sixty-day limitation on actions, we rule that ninety days is an unreasonable length of time within which to make request for unpaid wages under § 200.110 and therefore plaintiffs' requests came too late.

The judgment should be affirmed, and it is so ordered.

Coil and Holman, CC., concur.

Per Curiam.

The foregoing opinion by Houser, C., is adopted as the opinion of the court.

All of the Judges concur.

On Motion for Rehearing or to Transfer to Court En Banc.

Per Curiam.

In their motion for rehearing or to transfer to the court en banc appellants contend, for the first time, that a federal question is involved, and that this case should be governed by the federal common law or federal substantive labor law, in the interest of industrial peace. The *per curiam* opinions this day filed in Ackerman v. Globe-Democrat Publishing Co., Mo., 368 S. W. 2d 469, and Irwin v. Globe-Democrat Publishing Co., Mo., 368 S. W. 2d 452, dispose of these contentions adversely to appellants.

[14] Appellants further contend that our construction of the word "consolidation" contradicts the clear intention of the parties as expressed in the same clause of the contract. This constitutes mere reargument of one of the issues determined by the opinion, and under Supreme Court Rule 83.16, V. A. M. R. is to be disregarded.

The motion for rehearing or to transfer is overruled.

APPENDIX B.

In the
Supreme Court of Missouri,
Division Number One,
January Session, 1963.

Joseph P. Monterosso et al., Appellants; v. St. Louis Globe-Democrat Publishing Company, Respondent.	No. 49,663.

Appellants' Motion for Rehearing, or, in the Alternative, for Transfer to the Supreme Court En Banc.

Come now the Plaintiffs-Appellants and respectfully submit their motion for rehearing or in the alternative for transfer to the Court en banc within fifteen days of the entry of the opinion and judgment herein delivered in Division No. 1, on April 8th, 1963. For grounds in support of this motion, Appellants state as follows:

1. Appellants call to the attention of the Court the fact that this case was submitted in the Trial Court on an agreed stipulation of facts, jury waived, for trial by the Court only, under the provisions of Section 510.310 (4), M. R. S., and Rule 73.01 (d). In this type of submission, "The Appellate Court shall review the case upon both the law and the evidence as in suits of an equitable nature." This rule has been consistently defined since the case of Lins v. Lenhardt (29 S. W. 1025, l. c. 1027):

> "When an equity case comes up to this Court, it is for hearing de novo, and it will be considered for the most part as if it had originated here, and was to be heard for the first time."

The Court en banc again affirmed this rule in—In re Search Warrant v. Marcus, et al, (334 S. W. 2d 119, l. c. 124) (Reversed on other grounds, 81 S. Ct. 1708, 367 U. S. 717). Appellants respectfully submit that the evidence is submitted by the stipulation of facts; the law may be considered by this Court de novo.

2. Appellants state that "a federal question is involved" by reason of the opinion and judgment herein and under the requirements of Section 9, Article V of the Missouri Constitution a rehearing or transfer to the Court, en banc, is required. The federal question which now arises as a result of this Court's opinion and judgment is the clear violation by this Court of the substantive federal rights and privileges of these Appellants. These federal rights and privileges to which these Appellants make claim are as set out in the Labor Management Relations Act of 1947, Section 301 (a), 29 U. S. C., Section 185 (a), 29 U. S. C. A., Section 185 (a). The case of Smith v. Evening News Association, 83 S. Ct. 267, 4. c. 270 (Dec. 10, 1962, Mr. Justice White, delivering the opinion of the United States Supreme Court); holds that the United States Supreme Court

> "has (long since) settled that Section 301 has substantive content and that Congress has directed the Courts to formulate and apply **federal law** to suits for violation of collective bargaining contracts."

The opinion and judgment of this Court fails to apply these substantive rights in the following particulars:

(a) The opinion herein applied the following construction to Article XI, paragraph 2 of the contract (Opinion page 8):

> "We are of the opinion that the language of paragraph 2 relating to 'consolidation' is clear and unambiguous and capable of being enforced and given effect without resort to judicial construction to deter-

mine the intention of the parties; that paragraph 2 contemplates three possible, specifically defined and delimited situations in which Globe-Democrat Publishing Company, a corporation, might go out of business as the publisher of a newspaper; that the word 'consolidation' refers to consolidation of corporations, not to consolidation of the mechanical operations or of any department or partial function of Globe-Democrat; that no consolidation within the plain meaning of paragraph 2 was shown by the evidence to have occurred; that the facts do not fit any of the three situations contemplated, and therefore plaintiffs' rights to severance pay under the contract have not been established."

This Court then cites as apparent authority for this ruling the forty-eight year old United States Supreme Court opinion in a case involving the interpretation of the language of a trust instrument (Chater v. Carter, 238 U. S. 572, 584; 35 S. Ct. 859, 863).

(b) The following United States Supreme Court opinions all arising under Section 301, are in direct contradiction to the construction by this Court of the disputed clause (Art. XI, para. (2)):

(b) 1. This ancient opinion by the Supreme Court in Chater v. Carter, supra, may still be a valid guide to the interpretation of trust agreements but it can have no bearing upon the case before this Court in view of the recently established federal common law of labor contracts, established by the United States Supreme Court under and by virtue of Section 301 (a) of the Labor Management Relations Act, 29 U. S. C. A., Section 185 (a).

That section reads:

"Suits for violation of contracts between an employer and a labor organization representing em-

ployees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Under this section the Federal Courts are to fashion and develop a body of federal substantive or common law in the area of labor relations. **Textile Workers Union of America v. Lincoln Mills of Alabama**, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; **Smith v. Evening News Association**, ... U. S. ..., 83 S. Ct. 267, 270.

Section 301 (a) does not deprive the state courts of jurisdiction. **Charles Dowd Box Co., Inc. v. Courtney**, 368 U. S. 502, 82 S. Ct. 519, 7 L. Ed. 2d 483. However, it has been clearly announced that state courts in assuming jurisdiction of suits under collective bargaining contracts, must adhere to the federal common law of such labor contracts as fashioned by the federal courts. **Smith v. Evening News Ass'n**, supra. Federal common law and not state law must govern in the interpretation of labor contracts unless such state law is not incompatible with the federal law and not inconsistent with the policy of federal labor legislation. **Teamsters Local 174 v. Lucas Flour Co.**, 369 U. S. 95, 102; 82 S. Ct. 571; 7 L. Ed. 2d 593; **Livingston v. John Wiley & Sons, Inc.**, 52 Labor Relations Reference Manual 2322, ... F.2d ... (CA 2—1963).

The policy of federal labor legislation is the promotion of stability in collective bargaining agreements and the promotion of industrial peace and harmonious relations between employer and employees. 29 U. S. C. A. 151 et seq.:

> "The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon

both the negotiation and administration of collective agreements."

Local 174 Teamsters v. Lucas Flour Co., supra, 369 U. S. 100; 82 S. Ct. 577;

Smith v. Evening News, supra, l.c. 83 S. Ct. 270.

The decision by the Missouri Supreme Court, Division Number One, in Monterosso v. Globe-Democrat Publishing Company, is incompatible with the federal common law of labor agreements. Under the federal law, such collective bargaining contracts as that before this Court cannot be given such a limited and strict construction. Such contracts must be construed liberally to conform to the congressional policy of labor relations.

"In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."

United Steelworkers of America v. American Manufacturing Co., 363 U. S. 564, 567, 80 S. Ct. 1343, 1346.

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract, it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U. S. 574, 578; 80 S. Ct. 1347, 1351.

The pronouncements by the Supreme Court of the United States in June, 1960, are the essence of Petitioners' brief on appeal. The Court based its interpretation of the contract before it on definitions taken from the Missouri

Statutes on corporate structure and reorganization. But state corporation statutes defining such terms as "consolidation" are not binding in the interpretation of collective bargaining agreements unless it will best effectuate the federal policy of labor-management relations. Livingston v. John Wiley & Sons, Inc., supra.

In its opinion the Court ruled that because the event of consolidation of the Employer's mechanical operations "was not anticipated and expressly referred to in the agreement in question, no claim for severance pay can be upheld." This ruling is totally repugnant to the federal policy of promoting industrial peace through stability and harmonious relations. This clause appears in the contract of virtually every organized newspaper and print shop in the country. To allow this opinion to stand as is will foster and breed discontent and unharmonious relations, and lead to unnecessary and disrupting litigation. This is totally repugnant to the federal policy. See Livingston v. John Wiley & Sons, Inc., supra.

The United States Supreme Court has made reference to the many factors of competing interests between the state and federal government, in the area of labor relations and collective bargaining agreements. One such competing interest, for instance, might be the desire of an individual state to attract industry. Certainly such an interest could come into conflict with the Congressional policy of promoting industrial peace through collective bargaining.

> "Once the collective bargain was made, the possibility of conflicting substantive interpretations under competing legal systems would tend to stimulate and prolong disputes as to its interpretation."
>
> Teamsters Local 174 v. Lucas Flour Co., 369 U. S. 95, 103-104, 7 L. Ed. (2) 593, 599.

(c) Because of the obvious federal question raised by the antiquated method of interpretation of a clause in a collective bargaining agreement by this Court with the now required method of interpretation of a collective bargaining agreement set out by the federal law in Section 301 and spelled out by the United States Supreme Court in the above opinions the Appellants state that Section 9, Article V of the Missouri Constitution, requires a rehearing of this cause or, alternatively, a transfer of the cause to the Court en banc.

3. The opinion of this Court in holding that "the word 'consolidation' refers to consolidation of corporations, not to consolidation of the mechanical operation or of any department or partial function of Globe-Democrat" (Opinion page 8), is a total contradiction to the clear intention of the parties as further expressed in the same clause of the contract. The disputed clause reads:

> "**In the event of** merger, **consolidation** or permanent suspension of publication **by any newspaper covered by this contract all employees who lose employment thereby** shall receive severance pay as follows: etc."

If the word "consolidation" is to be construed to mean a "consolidation of corporations" then the phrase "**all** employees who lose employment thereby" must be construed to mean "**all** employees of the consolidating corporation who lose employment thereby shall recive severance pay." Thus, the literal interpretation forced onto the clause by this opinion allows the Mailers Union by their contract, to compel the Globe-Democrat to pay **all** of its corporate employees (i. e., printers, janitors, editors, etc.) the scheduled pay in the event of a corporate consolidation. Obviously this literal interpretation is violative of the contract law of this state and federal decisions in this field of labor contract law.

The case of A. C. F. Industries v. Missouri Industrial Commission, 320 S. W. 2d 484 (Supreme Court en banc), has clearly ruled that the

> "words and provisions of the contract (a collective bargaining agreement) are (also) to be construed and understood in accord with their plain and ordinary meaning, unless and until they are shown to mean something else."

Can the words and provisions of Article XI, paragraph 2, have any other plain and ordinary meaning except that the "consolidation" could only mean "**mailer** consolidation" and the words "all employees" could only mean "all Mailer employees?" Obviously the use of the word "all" by the parties to this contract in the disputed clause was intended to mean **less** than **all** employees of the corporation in the exact same sense that the use of the word "consolidation" was intended to mean **less** than a total corporate consolidation. The consolidation used in the contract was the same "consolidation of mechanical operations" proclaimed by Globe-Democrat Publisher Amberg in the Exhibit set out in detail on page 4 of the opinion. For this additional reason of misinterpretation of the intention of the parties the Appellants request a rehearing or transfer to the Court en banc of this cause.

Wherefore, Movants-Appellants respectfully pray that this Honorable Court make and enter its Order to withdraw and set aside its opinion and judgment entered herein, and grant Appellants a rehearing of this cause, or, in the alternative, order that this cause be transferred to the Court en banc, in order that the things and matters adverted to above may be more fully presented to the Court for its consideration.

Respectfully submitted,

Jerome J. Duff,

Attorney for Appellants.

APPENDIX C.

Harry Irwin et al., Respondents;

v.

Globe-Democrat Publishing Company, a Corporation, Appellant.

No. 49026.

Supreme Court of Missouri, Division No. 2.

April 8, 1963.

Motion for Rehearing or to Transfer to Court En Banc Denied June 4, 1963.

* * * * * * *

Per Curiam.

Plaintiffs contend in their motion for rehearing that we did not "take into account section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185 (a) and the decided cases of the Supreme Court of the United States holding that there should be a uniform body of substantive law conformable to the federal law in the field of labor relations," and that in deciding issues arising out of collective bargaining contracts this court "was sitting as a court of the United States," and consequently it was bound by the Seventh Amendment to the Constitution of the United States.

[6, 7] We have examined plaintiffs' brief filed in this court and we fail to find any reference to the above contentions. Only one federal case was cited in their brief, In re Public Ledger, Inc., 3 Cir., 161 F. 2d 762. Plaintiffs placed their complete reliance upon that case and upon

cases from this and other states, and upon the report in two arbitration decisions, all of which we expressly considered in the opinion. It has long been the rule that new propositions and complaints not submitted in the original brief, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down, Phippin v. Missouri Pacific R. Co., 196 Mo. 321, 93 S. W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, Mo., 274 S. W. 2d 286, 292, will not be considered on motion for rehearing. We do not propose now to change or relax that rule. However, if in a suit in a state court on a collective bargaining agreement by an employee we are required to apply "federal substantive law," and we did not do so and the result reached is contrary to such law, then plain error would have resulted. In our discretion, we may consider plain error affecting substantial rights, Civil Rule 79.04, V. A. M. R., and on that discretionary basis we shall examine the contention, presented now for the first time, that we erred in not ruling the case pursuant to "federal substantive law" which plaintiffs at no time urged.

Section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., § 185 (a), provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In Smith v. Evening News Association, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, the United States Supreme Court, speaking through Mr. Justice White, stated that this section "has substantive content and that Congress has directed the courts to formulate and apply fed-

eral law to suits for violation of collective bargaining contracts." Quoting then from Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593, the court also said: "'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'"

Plaintiffs assert that because "federal law" is to be applied to this case the "opinion should be reviewed to determine if it is harmonious with the body of substantive law in the field of labor relations as promulgated by the federal courts," and that if it is not this court should modify its opinion to so conform. The "body of substantive law" relied upon by respondents in their motion for rehearing, and in the suggestions in support thereof, consists of but one federal case (another federal case is cited in support of a different point), the same one cited in their original brief to this court, In re Public Ledger, Inc., 3 Cir., 161 F. 2d 762, and their argument pertaining to the substantive law of that case is precisely the same as that presented in their original brief which we carefully considered and rejected as decisive of the issue on appeal. Upon re-examination we are still of the opinion that In re Public Ledger, Inc. does not require nor justify a ruling different from that reached in the principal opinion.

In the preparation of the principal opinion we ruled the issues by giving the language of the contract its normal meaning in accordance with its accepted usage. In determining this meaning we looked not only to the one federal case and the numerous state cases cited by respondents but we also looked to and relied on other cases found by us in the course of our research including two cases in the lower federal courts and one opinion of the Supreme Court of the United States. No federal case

was then found, none has been found upon re-examination, and respondents certainly have cited no federal case which, in the words of Mr. Justice White, formulates and applies federal law which would require or justify a result different from that we reached in the principal opinion. Assuming, therefore, that in this suit we were required to apply federal substantive law, it is our conclusion that we did so and that we did so correctly. There is absolutely nothing in Smith v. Evening Press Association, or the other federal cases cited by plaintiffs in the motion for rehearing, which directly or inferentially holds that the result we reached is contrary to federal substantive law, and plaintiffs certainly have not demonstrated that on the merits we reached an incorrect result.

[8] We do not agree, assuming we are required to apply federal substantive law, that in doing so this court "was sitting as a court of the United States" any more than it is sitting as a court of a sister state when it applies the law of that state. Therefore, there is no merit to the contention that the Seventh Amendment to the Federal Constitution has any application to this case.

All other matters in the motion for rehearing have been carefully considered, and are found to be without merit, and the motion for rehearing is overruled.

Respondents also assert that because of the issues presented for the first time in their motion for rehearing "there is now involved in this cause a federal question," and they are entitled to have this case transferred to the court en banc.

[9, 10] Section 9, Article V, Constitution of Missouri, V. A. M. S., provides that a cause shall be transferred to the court en banc when (a) the members of a division are equally divided in opinion, (b) when the division shall so order, (c) on the application of the losing party

when a member of the division dissents from the opinion therein, (d) when "a federal question is involved," and (e) pursuant to supreme court rule. This court has held that the term "federal question" as used in Section 9 of Article V is to be "interpreted according to the standard" contained in Section 3 of Article V, pertaining to jurisdiction of the supreme court, which refers to "cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, * * *." McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 324 Mo. 1005, 25 S. W. 2d 791; Huckleberry v. Missouri Pac. R. Co., 324 Mo. 1025, 26 S. W. 2d 980, 988; Pashea v. Terminal R. Ass'n of St. Louis, 350 Mo. 132, 165 S. W. 2d 691, 696; State ex rel. Perrine v. Keirnan, 361 Mo. 871, 237 S. W. 2d 156. This case, as submitted to this court, did not involve a federal question. New matters not submitted in the original brief but raised for the first time in a motion for rehearing after the opinion is handed down do not present any federal question requiring a transfer to the court en banc. No supreme court rule requires a transfer of this case, and after careful consideration, we conclude that no reason exists for this division to order a transfer. The alternative motion to transfer to the court en banc is denied.

* * * * * * *

Walter H. Allen et al., Respondents,

v.

Globe-Democrat Publishing Company,
a Corporation, Appellant.

No. 49089.

Supreme Court of Missouri,
Division No. 2,

April 8, 1963.

On Motion for Rehearing or to
Transfer to Court En Banc.

Per Curiam.

Plaintiffs present a motion for rehearing containing thirty assignments of error. In their suggestions in support thereof they discuss only the contention pertaining to the alleged "failure by the Court to apply federal substantive law in reaching its decision," and those are the only assignments which merit additional comment.

[8; 9] Plaintiffs contend that pursuant to Section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., § 185 (a), and the decisions of the United States Supreme Court this court was required to apply federal substantive labor law in reaching its decision. We have re-examined plaintiffs' brief and find that no federal statute was cited therein, not even Section 301 (a), supra, and no federal cases whatever were cited. In the submission of this case they relied solely on state court cases, primarily those from Missouri. It has long been the rule that new propositions and complaints not submitted in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down, Phippin v. Missouri Pacific Ry.

Co., 196 Mo. 321, 93 S. W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, Mo., 274 S. W. 2d 286, 292, will not be considered on motion for rehearing. We do not propose now to change or relax that rule. However, if in a suit in a state court by an employee against an employer on a collective bargaining agreement, we are required to apply "federal substantive law" and we did not do so, and the result reached is contrary to such law, then plain error would have resulted. We may, in our discretion, consider plain error affecting substantial rights, Civil Rule 79.04, V. A. M. R., and on that discretionary basis we shall examine the contention, presented now for the first time, that we erred in not ruling the case pursuant to "federal substantive law" which plaintiffs at no time urged.

Section 301 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., § 185 (a), provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In Smith v. Evening News Association, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, the United States Supreme Court, speaking through Mr. Justice White, stated that this section "has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." Quoting then from Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co., 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593, the court also said: "'The possibility that individual contract terms might have different meanings under state

and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' "

Plaintiffs assert that "Under federal law the courts may even interpolate * * * if the federal policy will be served thereby," and although they say "such is not needed here" they clearly imply that their understanding of federal policy is that they should not lose this litigation, and that we should read into the contract such non-existing provisions as are necessary to carry out that policy. They say we "deviated from federal requirements" when we applied "the same Missouri law that would be applied to all contracts regardless of their nature," and "had the court considered federal law and endeavored to reach a conclusion consonant therewith, the court should have found itself compelled to reach a contrary result." They further argue that the result of plaintiffs losing this litigation "would certainly never promote industrial stability or peace and can only be 'a breeder of discontent and unharmonious relations between employer and employees,' " and the "failure to consider the interests and position of the plaintiffs could never meet or satisfy the federal requirements or standards."

[10, 11] We are not convinced that it is "federal policy" that in a suit of this nature we must interpolate into the contract such nonexisting provisions as may be necessary in order to enable plaintiffs to prevail regardless of the merits of their position. We shall, therefore, turn to the question of whether the result we reached in construing the terms of the contract as written is contrary to "federal substantive law." In their motion for rehearing plaintiffs cite not one federal case construing language of a collective bargaining agreement which was the same or similar to that construed in the principal opinion, and not one federal case is cited in the motion for rehearing

which tends to hold that the result we reached in construing the contract as written is incorrect. In the preparation of the principal opinion we ruled the issues by giving the language of the contract its normal meaning in accordance with its accepted usage. In doing so we considered every case cited by plaintiffs, none of which were federal cases. In our research on the issues we studied and considered not only Missouri cases, but the federal cases and cases of other states pertaining to the issues. We found no federal case directly in point, but we cited two, a court of appeals opinion and an opinion of the United States Supreme Court, on related matters. Assuming, therefore, that in this suit we are required to apply federal substantive law, it is our conclusion that we did so insofar as there has been a pronouncement thereof by the federal courts, and that we correctly applied it and the result reached is in accord therewith. There is absolutely nothing in Smith v. Evening News Association or any other federal case cited by plaintiffs in their motion for rehearing, which directly or inferentially holds that the result we reached is contrary to federal substantive law, and plaintiffs certainly have not demonstrated in their motion for rehearing that on the merits we reached an incorrect result. The motion for rehearing is overruled.

For the reasons set forth in the per curiam in Irwin v. Globe-Democrat Publishing Company, Mo. ..., S. W. 2d ..., there is no federal question which requires or justifies a transfer of this case to the court en banc. No supreme court rule requires, and we find no reason to order, its transfer. The alternative motion to transfer to the court en banc is denied.

* * * * * * *

Meyer Ackerman et al., Respondents,

v.

Globe-Democrat Publishing Company, a Corporation, Appellant.

No. 49308.

Supreme Court of Missouri, Division No. 1.

April 8, 1963.

On Motion for Rehearing or to Transfer to Court En Banc.

Per Curiam.

Respondents have filed a motion for rehearing or to transfer to the court en banc. Transfer is requested on the contention that this case involves a federal question requiring the transfer of the case to the court en banc under Constitution of Missouri, 1945, Art. 5, § 9, V. A. M. S., namely, individual employees' rights arising under a collective bargaining agreement with an employer engaged in activities affecting interstate commerce within the meaning of and subject to the Labor Management Relations Act 1947, as amended, and that the case arises under and is governed by Section 301 (a), L. M. R. A., 29 U. S. C., § 185 (a).

[10, 11] No question involving the construction of the constitution of this state or of the United States, or the validity of a treaty or federal statute, or any authority exercised under federal laws,[1] was raised or involved in

[1] These are the standards by which we determine whether there is a "federal question" requiring transfer. McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 324 Mo. 1005, 25 S. W. 2d 791; Huckleberry v. Missouri Pac. R. Co., 324 Mo. 1025, 26 S. W. 2d 980, 988; Pashea v. Terminal R. Ass'n of St. Louis, 350 Mo. 132, 165 S. W. 2d 691, 696; State ex rel. Perrine v. Keirnan, 361 Mo. 871, 237 S. W. 2d 156.

the original submission of this case, either in the trial court or in this court, until after the opinion of this court was handed down. The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc, under our practice and procedure.

Respondents further contend that in construing this collective bargaining agreement local state law instead of applicable federal substantive law was improperly applied; that the principles and precepts of federal labor law and policy must be observed; that the context in which this agreement was negotiated and the purpose it was intended to serve should have been considered; that collective bargaining agreements are federal contracts which are conceptually different from other contracts and subject to different approaches in their construction and enforcement. It is urged that the interests and positions of respondents were not considered; that the obvious intendment and purpose of Article XI was overlooked; that federal labor law and policy require a construction favorable to the demands of respondents; that the courts should interpolate terms which might have been but were not included in the agreement, so as to effectuate the policies of federal labor law and accomplish the "evident aims and purpose" of the agreement, where necessary; that respondents' interpretation of the agreement is "in accord with substantive federal law," and that we should rule in respondents' favor because our construction of the agreement can only breed discontent and inharmonious relations between employers and employees, constitute a source of unnecessary and disrupting litigation, and have an unsettling effect upon the negotiation and administration of collective bargaining agreements throughout the country.

[12] The suggestion that federal labor policy and federal substantive law governs the construction of this

agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law and determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup., 274 S. W. 2d 286, 292, ordinarily will not be considered on motion for rehearing. We will consider the matter, however, sufficiently to point out the following: Although on original submission respondents cited no federal cases, but only Missouri cases and cases from other states, and on this motion for rehearing have not cited any federal cases construing a provision similar to Article XI, our original research, and our research on this motion for rehearing, was conducted in the case law of both hierarchies, state and federal. We have found no federal cases construing such a provision or a similar provision and we are of the opinion that there are no ruling cases in the federal courts applying any different rule or reaching any different result on comparable facts. Respondents have not shown that our decision is contrary to any federal decisions on this subject. We consider our decision not inconsistent with the existing body of federal law. The parties were accorded a review of the provisions of the contract under applicable law on the merits in accordance with accepted principles of construction and on the basis of what the parties said in their agreement. Neither respondents, nor appellant, were entitled to prevail

on the basis of what they intended to say or might have said, or on the basis of the effect a certain construction may have upon industrial peace, nor on any basis except the merits of their contentions.

Nothing said in Smith v. Evening News Association, 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246, or in any of the other United States Supreme Court decisions cited in respondents' suggestions, militates against the conclusions we have reached. In none of these cases was there a question of construction analogous or similar to that presented in this case. Assuming that we are obliged to follow and apply federal substantive labor law and policy, the United States Supreme Court has not issued any universal ukase that in all cases of disagreement between the parties to collective bargaining agreements federal labor law and policy dictates that the position of the labor union shall be sustained arbitrarily or that the preservation of harmonious labor relations requires the capitulation of employers in all cases where questions of interpretation arise, regardless of the merits of the case, but this is what respondents seem to imply.

Having decided this case on its merits we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, "lest it be summarily returned to this Court by the Supreme Court of the United States," as respondents' counsel warn on page 12 of their suggestions.

[13] Respondents' contentions that we misinterpreted the law in holding that the General Laws were not incorporated into the agreement; in applying improper principles of review; in holding that the motion for a directed verdict should have been sustained; in ruling that permanent suspension of publication cannot be interpreted to mean permanent suspension of printing; in holding that Article XI means corporate merger or consolidation by

appellant; in holding that permanent suspension of publication meant to go out of business as a publisher of a newspaper; in invading the province of the jury by construing the language of Article XI; and in failing to consider controlling decisions of local law with which this opinion is said to conflict, constitute mere reargument of issues determined by the opinion. Under Sup. Ct. Rule 83.16, V. A. M. R. reargument of such issues will be disregarded. We have carefully examined these contentions seriatim and have satisfied ourselves that no matters of law or fact have been overlooked or misinterpreted. The motion for a rehearing or to transfer is overruled.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 25 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 414

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY,*
Respondent.

BRIEF

In Opposition to Certiorari.

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri, 63101,
Attorney for Respondent.

Of Counsel:
HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri, 63101.

* Corporate name of respondent is incorrectly given by petitioners as "St. Louis Globe-Democrat Publishing Company" throughout their pleadings.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

INDEX.

	Page
Table of Cases	This page
Summary of Argument	1
Argument in re:	
I. No Federal Question Presented	3
II. Adequate Non-Federal Grounds	3
III. Petitioners Estopped	7
Conclusion	12

Cases Cited.

Fay v. Noia, ... U. S. ..., 83 S. Ct. 822 (1963)	3
Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480	4, 7
Robinson v. Gaines, 331 S. W. 2d 653, 655	8
Smith v. Evening News, 83 S. Ct. 271	8
Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529	11

Statutes and Rule Cited.

Mo. Sup. Ct. Rule 3.14	8
490.110 Mo. R. S. 1959	9
29 U. S. C., § 185 (a) (L. M. R. A., § 301 (a))	8, 9, 10

Textbooks Cited.

3 Am. Jur., App. and Error, § 876	11
5 C. J. S., App. and Error, § 1501	11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. .....

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Certiorari.

SUMMARY OF ARGUMENT.

Nothing is presented for review by the petition for writ of certiorari in this case; because:

I. The "question presented" (Pet'n. p. 2) is not a federal question.

II. Whether or not a federal question was ruled by the Missouri Supreme Court, adequate independent dispositive non-federal grounds for the decision appear (a) in the

original opinion, and (b) in the opinion passing on the motion for rehearing or transfer, in which petitioners attempted for the first time to raise a federal question.

III. The application of Missouri substantive law to the issues, which is now claimed as error, was invited,—nay, demanded,—by petitioners at every stage of the Missouri litigation, and they are estopped from asserting here and now that in doing precisely what they had asked, the courts below committed error.

ARGUMENT

I

Petitioners state the question presented by their petition in the following language (Pet. Br. 2):

> "Whether a state supreme court may interpret a collective bargaining agreement in a suit by individual employees against the employer, by rejecting from consideration the intention of the parties, the context in which the agreement was negotiated and the purpose which the collective bargaining agreement is intended to serve."

Argumentative in form, and false in implication as this question no doubt is, it does not state a federal question at all.

Lacking any reference to a federal right, the question (even if it were an accurate description of what the Missouri court did) can only be answered by this court, "yes."

Even at this stage, no federal question is presented, and the petition must be denied.

II

Adequate independent non-federal grounds for the decision sought to be reviewed appear in the opinions below, and the writ should not be granted.

The principle involved is unanimous and unequivocal, and iterated in a line of Supreme Court opinions, the latest of which (as we read the reports) is Fay v. Noia, U. S. , 83 S. Ct. 822 (1963). In this opinion the rule is stated as follows (l. c. 843):

> "It is a familiar principle that this Court will decline to review state court judgments which rest on

independent and adequate state grounds, notwithstanding the co-presence of federal grounds. [Citing authorities]. Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 85-87, denied this Court power to base the reversal of a state court decision on any error other than such as * * * immediately respects * * * questions of validity or construction of the said [Federal] Constitution, treaties, statutes, commissions, or authorities in dispute.' * * * Murdock [v. Memphis] was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, applied the principle directly to facts legally indistinguishable from those before us in this matter, viz.:

> "Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.
>
> "This brings the situation clearly within the settled rule whereby this Court will not review a state court decision resting on an adequate and independent, non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law." [Quoting authority]

Petitioners concede (Petition, p. 4) that they raised no federal question, either in the trial court or in the submission of their appeal to the Missouri Supreme Court. None was discussed in the initial opinion, which considered and decided all issues raised by petitioners in favor of respondent and affirmed the judgment (App. A).

The only other ruling of the Missouri court is the *per curiam* opinion on the order overruling the motion for rehearing.

So far as relevant, this opinion reads (App. A, p. 23, Petition):

> "In their motion for rehearing or to transfer to the court en banc appellants contend, for the first time, that a federal question is involved, and that this case should be governed by the federal common law or federal substantive labor law, in the interest of industrial peace. The per curiam opinion, this day filed in Ackerman v. Globe-Democrat Publishing Co., Mo. . . , 368 S. W. 2d 469, and Irwin v. Globe-Democrat Publishing Co., . . Mo. . . , 368 S. W. 2d 452, disposed of these contentions adversely to appellants.
>
> "The motion for rehearing or to transfer is overruled."

The Supreme Court of Missouri sits in two divisions. This case and the Ackerman case were decided by the Judges of Division No. 1 (App. C, 41), and the Irwin and Allen cases by those of Division No. 2 (App. C, 32, 37).

The Ackerman *per curiam* opinion (by the same division, on the same day) must have been foremost in the Court's mind in deciding the motion in this case. The Ackerman opinion categorically rules the supposed Federal question to have been raised too late (App. C, 42, 43):

> "The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc under our practice and procedure."

. . . . . .

> "The suggestion that federal labor policy and federal substantive law governs the construction of this agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No

reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law, and determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 763, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Mo. Pac. R. Co., 196 Mo. 321, 93 S. W. 410, 448, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup., 274 S. W. 2d 286, 292, ordinarily will not be considered on motion for rehearing."

The only discussion of the merits of appellants' asserted federal question immediately follows, commencing with these words:

"We will consider the matter, however, sufficiently to point out the following: . . ."

What the Court then points out is the apparent lack of Federal authority, cited or found, showing "that our decision is contrary to any federal decisions on this subject," and it concludes this phase of the opinion by saying (App. C, p. 44):

"Having decided this case on its merits [in the original opinion] we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, lest it be summarily returned to this Court by the Supreme Court of the United States', as respondents' counsel warn on page 12 of their suggestions."

It is perfectly clear that the Missouri Supreme Court in this case, as in the simultaneous out-of-the-same-division Ackerman case, adhered to its decision of the case on the merits as it had been originally presented, and ruled the newly asserted federal question was not cognizable, because raised out of time.

In our brief in opposition to grant of certiorari in the Irwin case we have shown that the Irwin *per curiam* opinion did not decide the federal question, but merely assumed for purpose of discussion that federal substantive law was applicable. We have shown also that this opinion, like Ackerman, overruled plaintiffs' motion to transfer on the express ground that the question was raised too late (see instant petition, p. 36). Whatever view be taken of the Irwin opinion, suffice it to say that if the reference to the other *per curiam* opinions made in the Monterosso *per curiam* opinion adopts the reasoning of both cases, the decision in Monterosso is certainly based in part, at least, on adequate and independent non-federal grounds, i. e., that the assertion of the federal question came too late.

We do not see how it can be said that the decision in this case ruled a federal question at all. But if it be considered that the opinion does so, at least it must be conceded that it also ruled that the federal question was raised too late.

This is a matter of local procedure, and not of federal substantive right. WOW v. Johnson, *supra*; and since it was an independent and adequate ground of decision which cannot be reviewed on certiorari, the writ should not be granted.

III.

An examination of the plaintiffs' pleadings, arguments and submissions in the Missouri Courts reveals that they themselves sought, throughout, a determination of their rights under principles of Missouri—not federal—substantive law.

(a) Petitioners' first amended petition upon which their claims are still based is set out in the transcript of record, p. 1, et seq. An examination of that petition shows

that plaintiffs were (and still must be) asking for a determination of their rights under Missouri law, and not under federal law.

Item: Any relevant federal right must arise out of L. M. R. A., § 301 (a), 29 U. S. C., § 185 (a). The basic requisite of that statute (for constitutional reasons) is that the employment be "in an industry affecting commerce as defined in this Act." No allegation appears in the petition that this jurisdictionally requisite fact existed.

Item: Since the decision of the Supreme Court of Missouri in this case, there has been filed a complaint by petitioners' union against this respondent, now pending in the United States District Court for the Eastern District of Missouri; a certified copy of which has been filed with the Clerk of this Court.* This complaint, based on the same facts, [illegible] seeking, through the representation of the same counsel, much of the same recovery as that sought in the action now under review, clearly states plaintiffs' invocation of federal rights (Par. 1):

> "The plaintiff asserts its cause of action as a Union under contract with the Defendants within the provisions of the Labor Management Relations Act of 1947, Sec. 301 (a), 29 U. S. C. A. 185 (a)."

No analogous allegation appears anywhere in the petitioners' pleadings in the case at bar. This is a requisite, under Missouri procedure, to the application of extra-state law (Mo. Sup. Ct. Rule 3.14; Robinson v. Gaines, 331 S. W. 2d 653, 655).

---

* The problems of res judicata, estoppel by judgment, splitting claims, etc., presented by this complaint, may be an illustration of the "confusion, conflicts and burdensome proceedings" foretold by Mr. Justice Black's dissent in Smith v. Evening News, 83 S. [illegible]

490.110 Mo. R. S. 1959, provides as follows:

> "Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction, or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise."

Item: It is alleged (Par. 2) that defendant is a Missouri corporation doing business in Missouri, and publishing a newspaper "in said City and State". (This would be irrelevant to a claim under § 301 (a).) Why was this allegation made?

Item: [Because] Penalties are sought under two Missouri statutes, applicable under certain circumstances to actions for the recovery of unpaid wages under Missouri substantive law, but wholly inapplicable to recovery under Section 301 (a) of L. M. R. A. The statutes are set out in the plaintiffs' first amended petition (Par. 6, Par. 7, Rec. pp. 9-10), and each statute requires Missouri residence of the defendant's business:

> (Par. 6) "The employees of the operators of all manufactories, including plate glass manufacturies, *operated within this state* shall be regularly paid," etc.
>
> (Par. 7) "Whenever any corporation *doing business in this state* shall discharge," etc.

Both the trial court (R. 29) and the Missouri Supreme Court (App. A, pp. 20-22), were required by petitioners to pass on the penalty claim, because vacation pay was held due these plaintiffs in the trial court, and defendant did not appeal.

The assertion of these penalty claims which are applicable to Missouri employees only, is wholly antithetical to

the assertion of the applicability of a body of uniform and nation-wide federal substantive law formulated under § 301 (a) L. M. R. A.

(b) The trial court's opinion is set out in the Record at p. 20, et seq. It discusses and disposes of every contention raised by petitioners in a manner unusual, and highly commendable, for trial judges in any jurisdiction. Nothing is preserved of the arguments in the trial court, except the hearsay evidence of the trial court's opinion (R. p. 26). No shred of suggestion of a federal right appears from the opinion. It is clear, even from the reference to the New Jersey decision cited by petitioners (R. p. 27) that the trial court understood that he was asked to judge the plaintiffs' claim according to rights asserted under Missouri substantive law.

(c) Petitioners' motions to amend the judgment or, alternatively, for a new trial, are set out at pages 31 and 38 of the Record. They consist of a frontal attack on the opinion as a misapplication of Missouri or general contract law, with no suggestion of a federal rule. One of the cases is cited in these words: "the Missouri case of Dodier Realty and Investment Co. v. St. Louis National Baseball Club, Inc., Supreme Court of Missouri, en banc, February, 1951." Petitioners say of this opinion (R. 34):

> "In the Dodier case the Supreme Court en banc obviously rules that there is a well defined difference in the Law of Missouri [sic] between a merger and a consolidation of corporate entities."

(d) Petitioners' oral argument in the Missouri Supreme Court is not preserved. However, petitioners concede (Pet. p. 4) that they there raised no federal question, and the two opinions of the court confirm this. A copy of their printed Statement, Brief and Argument, however, has been filed with the Clerk of this Court.

Of the three points they raised in their Missouri Supreme Court brief, only point one is of significance here because point two was rejected as not in compliance with the court's rules (App. A, p. 20), and the third point dealt with the purely local-law question of the applicability of the penalty statutes.

The discussion of point I (14-22) occupies thirteen pages of the brief, without the slightest suggestion that some other body of law than local Missouri contract law should be applied. Of the thirty-two citations of authorities it contains, twenty-six are to decisions of Missouri courts.

Thus, the petitioners invited the Missouri Supreme Court, as they had invited the Missouri trial court, to determine their rights under principles of Missouri contract law. They will not now be heard to assert that the Missouri courts committed error in doing so.

> "An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling or error was made at his request or suggestion, or on his urging, or where he procured the making of the ruling or the taking of the action." 5 C. J. S., App. and Error, 1501.
>
> "The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make." 3 Am. Jur., App. and Error, 876.

In Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529, this court held:

> "The plaintiff also seeks to support the judgment on the theory that * * * But he is not in a position to

urge this contention here. The case stated in the complaint was distinctly in tort. There was no question of a contract obligation, nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

CONCLUSION.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri, 63101,
Attorney for Respondent.

Of Counsel:
HOCKER, GOODWIN & MacGREEVY,
411 North Seventh Street,
St. Louis, Missouri, 63101.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 7 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 414.

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

ST. LOUIS GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

PAUL E. DIXON,
722 Chestnut Street,
St. Louis 1, Missouri,
JEROME J. DUFF,
818 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioners.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477

INDEX

	Page
Reasons for Reply	1
Conclusion	4

AUTHORITIES.

Cases Cited.

Irwin v. Globe-Democrat Publishing Co., Mo., 668 S. W. 2d 452, l. c. Per Curiam Opinion (6, 7) 458 3

United Steelworkers of America v. American Mfg. Co., 80 S. Ct. 1343, l. c. (5, 6) 1346 2

Rules Cited.

Missouri Revised Statutes, 1959 4

Missouri Rules of Civil Procedure, 79.04, V. A. M. R. 4

Missouri Supreme Court Rules, 79.04, Vol. 4, pg. 5011 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 414.

JOSEPH P. MONTEROSSO, et al.,
Petitioners,

v.

ST. LOUIS GLOBE-DEMOCRAT PUBLISHING COMPANY.
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

REASONS FOR REPLY

Petitioners were compelled to petition for and obtain time to file a reply to the Respondent's Brief in Opposition to Certiorari because of Respondent's unwarranted and unorthodox actions in injecting into this litigation the wholly irrelevant, immaterial and unrelated issue of a suit filed on August 5, 1963 by the St. Louis Mailer's Union Local No. 3, against the Globe-Democrat Publishing Co. et al., in the U. S. District Court in St. Louis, Missouri. Respondent then states that "a certified copy of (the Complaint) has been filed with the Clerk of this Court."

Respondent then refers to certain "problems" which are "presented by this Complaint" in its footnote reference to the filing of the Complaint with the Clerk of this Court. The irrelevant, immaterial and unorthodox reference to this St. Louis Mailer's Union Local No. 3 v. St. Louis Globe-Democrat Publishing Company et al., litigation is contained on page 8 of Respondent's Brief in Opposition to Certiorari.

It is with great reluctance that Petitioners deign to reply to the unwarranted and unorthodox injection of this false issue. Petitioners' reluctance arises only because of their concern for dignifying this type of desperate tactic by their opponent. Petitioners are further compelled to file with the Clerk of this Court a certified copy of the responsive pleadings filed by the Defendant, Globe-Democrat Publishing Co., to the Complaint of the St. Louis Mailer's Union Local No. 3. No where in the Globe's responsive pleadings do the mysterious "problems" designated by Respondent in its footnote reference on pg. 8 of its Brief as "res judicata, estoppel by judgment, splitting of claims, etc." appear in the form of affirmative defenses to this apparently disturbing Complaint.

The opportunity to reply to Respondent's Brief in Opposition further compels two additional observations regarding the posture of Respondent's opposition to Certiorari in this case. On page 3, Point I (Respondent's Brief), respondent fearlessly goes into the very teeth of the reasoning of this Court in Mr. Justice Douglas' opinion in the case of United Steelworkers v. American Mfg. Co., 80 S. Ct. 1343, l. c. (5, 6), 1346.

This Court's opinion states:

(1) ". . . In our role of developing a meaningful body of law to govern the interpretation and enforce-

ment of collective bargaining agreements, **we think special heed should be given to the context** in which collective bargaining agreements are **negotiated and the purpose which they are intended to serve**" (Boldface added for emphasis by Petitioners).

Petitioners paraphrased this sentence in their petition (Petitioners' Brief, pg. 2), as follows:

> "Whether a state supreme court may interpret a collective bargaining agreement in a suit by individual employees against the employer, **by rejecting from consideration the intention** of the parties, **the context** in which the agreement was negotiated and **the purpose** which the collective bargaining agreement is intended to serve" (Bold face added for emphasis by Petitioners).

Respondent interprets (Respondent's Brief, pg. 3), as follows:

> "Argumentative in form, and false in implication as this question no doubt is, it does not state a federal question at all.
>
> Lacking any reference to a federal right, the question (even if it were an accurate description of what the Missouri court did) can only be answered by this court, '**yes.**'" (Bold face added for emphasis by Petitioners).

Finally, Respondent has failed to include anywhere in his Brief, the legal basis upon which the Missouri Supreme Court considered and ruled upon the "federal question" in its opinion in the case of Irwin v. Globe-Democrat Publishing Company (Missouri, 368 S. W. 2d 452, l. c. PER CURIAM opinion (6, 7), 458) (This opinion was cited and relied upon in the PER CURIAM opinion in Petitioners' case (Petitioners' Brief, pg. 23)). The opinion states (Petitioners' Brief, pg. 33):

> "However, if in a suit in a state court on a collective bargaining agreement by an employee we are required to apply 'federal substantive law,' and we did not do so and the result reached is contrary to such law, then plain error would have resulted. In our discretion, we may consider plain error affecting substantial rights, Civil Rule 79.04, V. A. M. R., **and on that discretionary basis we shall examine the contention**, presented now for the first time, **that we erred in not ruling the case pursuant to 'federal substantive law'** which plaintiffs at no time urged" (Bold face added for emphasis by Petitioners).

The Missouri Civil Rule upon which the Missouri Supreme Court considered and ruled upon the "federal question" is fully cited as Missouri Rules of Civil Procedure, 79.04, V. A. M. R.; Missouri Supreme Court Rules, 79.04, Vol. 4, pg. 5011, Missouri Revised Statutes, 1959. The rule is as follows:

> "Plain errors affecting substantial rights may be considered on motion for a new trial or on appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest injustice or miscarriage of justice has resulted therefrom."

CONCLUSION.

Petitioners respectfully submit in reply to the Respondent's Brief in opposition to Certiorari that the Respondent's attempted injection of unwarranted and irrelevant issues in an unorthodox fashion cannot cloud the fact that the "federal question" is timely raised and the further fact that this Court has clearly charted the course by which the Supreme Court of Missouri will interpret and

enforce collective bargaining agreements. Petitioners again pray that the Writ of Certiorari issue.

PAUL E. DIXON,
722 Chestnut Street,
St. Louis 1, Missouri,

JEROME J. DUFF,
818 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioners.

Affidavit of Service.

State of Missouri, } ss.
City of St. Louis. }

I, Jerome J. Duff, of counsel for the Petitioners herein, and an attorney of record for the Petitioners in the Courts below, depose that on the ..... day of October, 1963, I served four copies of the foregoing Reply of Petitioners to Respondent's Brief in Opposition to Certiorari, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Lon O. Hocker, Jr., Attorney of Record for the Respondent in care of the law offices of Hocker, Goodwin and MacGreevy, Ambassador Building, 411 North Seventh Street, St. Louis 1, Missouri.

.....
Jerome J. Duff.

Subscribed and sworn to before me at St. Louis, Missouri, on this ..... day of October, 1963.

.....
Notary Public.

My Commission Expires: